IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

LETTERS PATENT APPEAL No. 709 of 2000
In
SPECIAL CIVIL APPLICATION No. 6373 of 1999
With
CIVIL APPLICATION No. 3145 of 2000
In LETTERS PATENT APPEAL No. 709 of 2000

For Approval and Signature:

HONOURABLE MS. JUSTICE R.M.DOSHIT
HONOURABLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT & 1 - Appellant(s)
Versus
MM BHAVSAR - Respondent(s)

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Appearance :
MR UDAY BHATT, AGP for Appellant(s) : 1 - 2.
MR IS SUPEHIA for Respondent(s) : 1,

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CORAM : HONOURABLE MS. JUSTICE R.M.DOSHIT

and

HONOURABLE MS.JUSTICE H.N.DEVANI

Date : 04/08/2006

ORAL JUDGMENT

(Per : HONOURABLE MS. JUSTICE R.M.DOSHIT)

This Appeal preferred by the State Government under clause 15 of the Letters Patent arises from the judgment and order dated 8th October, 1999 passed by the learned Single Judge in Special Civil Application No.6373 of 1999.

The respondent - a Peon under the Commissioner of Fisheries, the appellant No.2 herein, had preferred the above Special Civil Application No.6373/1999 seeking absorption under the Commissioner of Fisheries, the appellant No.2 (hereinafter referred to as, **"the Commissioner"**) on the post carrying the pay-scale of Rs.800-1150 and to fix his pay in the revised pay-scale of Rs.2550-3200 as on 1st January, 1996.

Facts leading to the present Appeal are as under:-

Initially the respondent was temporarily appointed under the Commissioner on 19th November,

1970 as a Packer in Class-IV service in the pay-scale of Rs.90-110. In the year 1974 the State Government established a Printing Press under the Commissioner. While serving as Packer, the respondent applied for appointment as Distributor in Class-IV service in the aforesaid Printing Press. Upon his selection, by order dated 19th March, 1981 he was appointed as Distributor in the pay scale of Rs.210-270. The said pay-scale of Rs.210-270 was revised to Rs.800-1150 with effect from 1st January, 1986.

While the petitioner was serving as Distributor, the State Government decided to close the said Printing Press. On 26th July, 1990 the Government passed a resolution to close the Printing Press and, inter alia, to absorb the employees of the Printing Press in the offices under the control of the Commissioner on the posts in the same pay-scale. The respondent was, therefore, required to be absorbed on a post in the pay-scale of Rs.800-1150. The respondent, however, expressed his inability to move out of Ahmedabad/Gandhinagar. Instead he was willing to be absorbed on any Class IV post but at

Ahmedabad/Gandhinagar. Pursuant to the said request made by the respondent, by order dated 21st February, 1991 the respondent was temporarily absorbed as a Peon in the pay-scale of Rs.750-940 and was posted at Ahmedabad in the Fisheries Farmers' Development Agency on condition, inter alia, to protect the last pay drawn by the respondent. Pursuant to the said order by order dated 25th July, 1991 his pay was fixed at Rs.1030 by giving him the benefit of personal pay of Rs.90. After the said appointment was approved by the State Government, the said order of absorption was confirmed by order dated 19th September, 1997.

In the mean time, on 5th July, 1991 the State Government decided to give the benefit of higher grade scale to all Government employees who were stagnated in the same pay-scale for specified number of years. By order dated 20th July, 1995 the said benefit was extended to the respondent. As the respondent had worked as a Distributor in the Printing Press under the control of the Commissioner continuously for more than nine years, on completion of the period of nine years with effect from 7th

April, 1990 he was allowed the pay-scale of Rs.1200-1800 of the higher post of Compositor. His pay as on 7th April, 1990 was fixed at Rs.1200. 1st April was the date for increment. Accordingly, his pay as on 1st April, 1995 was fixed at Rs.1350. In view of the said pay fixation and his permanent absorption made on 19th September, 1997, the respondent, by his representation dated 18th June, 1999, demanded that he was wrongly absorbed on the post of Peon. The post of the Distributor was a Class-III post. He may, therefore, be absorbed on a post carrying the pay-scale of Rs.1200-1800 in Class-III service. The said representation was considered. By order dated 21st July, 1999 made by the State Government, Department of Ports and Fisheries, the demand made by the respondent was rejected. The respondent was also denied the pay protection assured under the aforesaid order dated 21st February, 1991. Feeling aggrieved, the respondent preferred the above Special Civil Application No.6373/1999 before this Court under Article 226 of the Constitution of India.

The petition was contested by the State

Government. The State Government denied that the post of Distributor in the Printing Press under the Commissioner was a Class-III post. The State Government has produced the recruitment rules of 5th July, 1976. It was averred that at the relevant time the respondent was serving as a Distributor in Class IV service in the pay scale of Rs.800-1150. He was, therefore, entitled to absorption in a cadre carrying the pay-scale of Rs.800-1150. However, it was the respondent who insisted that he be posted either at Ahmedabad or at Gandhinagar. He agreed to accept posting on any Class-IV service at Ahmedabad or at Gandhinagar. Under communication dated 3rd August, 1990 he also agreed to forgo right to seniority. Pursuant to his request he was offered appointment as Cleaner in Class-IV service which the respondent did not accept. He was, therefore, absorbed as Peon in the pay-scale of Rs.750-940. According to the State Government the respondent, having accepted the appointment as Peon and having served as such, the demand for absorption on a post in the higher pay-scale made by the respondent was not justiciable. Moreover, under the prevalent rules governing the

fixation of pay, the respondent was not entitled to pay protection either. On the closure of the Printing Press the respondent was facing retrenchment or discharge from service. To avoid retrenchment or discharge from service, such persons were absorbed in other services under the Commissioner. The respondent, therefore, cannot have a right to hold a particular post under the Commissioner nor can he claim any right which would adversely affect the other employees under the control of the Commissioner. As the respondent was offered appointment as a Peon afresh for all purposes including for pay fixation the respondent ought to be treated as a fresh appointee.

The learned Single Judge did not agree with the contentions raised by the State Government. According to the learned Single Judge, at the time of the closure of the Printing Press and the absorption of the respondent in service as a Peon, the respondent could not have envisaged the Government policy of payment of higher grade scale. He, therefore, cannot be said to have forgone his right to be absorbed on

the post carrying higher pay scale which he was offered in the year 1995 effective from 7th April, 1990. The learned Single Judge was accordingly pleased to quash the aforesaid order dated 21st July, 1999 and to direct the appellants to place the petitioner in the higher pay-scale with effect from the date of his absorption. Feeling aggrieved, the State Government and the Commissioner have preferred the present Appeal.

Learned AGP Mr.Bhatt has assailed the order of the learned Single Judge. He has submitted that the appellant was absorbed as Peon and was posted at Ahmedabad at his own request. The appellant, having availed of the said benefit of posting at Ahmedabad, cannot have a right to claim absorption in the higher pay-scale of Rs.1200-1800. The learned Single Judge has manifestly erred in not appreciating that the appellant had been accommodated at Ahmedabad on the lower post of Peon at his own request.

The Appeal is contested by learned advocate Mr.Supehia. He has supported the judgment passed by

the learned Single Judge. He has relied upon the order dated 21st February, 1991 (Annexed to the rejoinder affidavit). He has submitted that by the said order the respondent was absorbed as a Peon on specific condition that he would be entitled to pay protection. He has, therefore, submitted that the said benefit cannot now be permitted to be taken away. All that the respondent asked for was the implementation of the said order and the Resolution of 26th July, 1990.

From the facts recorded hereinabove, it is apparent that the respondent was appointed as a Distributor in the Printing Press under the control of the Commissioner by direct recruitment. By Notification dated 5th July, 1976 the State Government had, in exercise of powers conferred by proviso to Article 309 of the Constitution of India, framed the Distributor Recruitment Rules, 1976. Rule-2 thereof provided that, **“the post of Distributor in Gujarat Fisheries Subordinate Service, Class-IV, shall be made by direct selection.”** On closure of the Printing Press under Government Resolution dated 26th July,

1990 the appellant had become surplus. However, as decided by the State Government he was required to be absorbed on any other equivalent post under the Commissioner. The post of Distributor at the relevant time carried the pay-scale of Rs.800-1150. The respondent, however, was not willing to go out of Gandhinagar or Ahmedabad. It was at his request that he was accommodated at Ahmedabad on the lower post of Peon in the scale of Rs.750-940. On 26th July, 1990 (the day of closure of the Printing Press) the pay of the respondent as a Distributor was Rs.1030. Considering the last pay drawn by the respondent and the pay protection granted under the order dated 21st February, 1991, by order dated 25th July, 1991 his pay was fixed at Rs.940, the maximum in the scale of Peon. Rs.90 was added as a personal pay to make the respondent's pay to Rs.1030. In view of the Government policy of grant of higher pay-scale, by order dated 20th July, 1995 the respondent was, on completion of nine years' service as a Distributor, allowed the pay-scale of Rs.1200-1800 (the pay scale of the promotional post of Compositor) effective from 7th April, 1990. His pay as on 7th April, 1990 in the

scale of Rs.1200-1800 was fixed at Rs.1200. The date of the next increment being 1st April, 1991. Thus, for the purpose of pay fixation the respondent's pay on 26th July, 1990 (the day of the closure of the Printing Press) was Rs.1200. We are, therefore, of the view that on his absorption as a Peon on 21st February, 1991 in the Fisheries Farmers' Development Agency, the respondent was entitled to pay fixation with the protection of last pay which is now worked out at Rs.1200 instead of Rs.1030. The order dated 25th July, 1991 made for fixation of pay of the respondent was required to be modified accordingly. In our view, the impugned communication dated 21st July, 1999, in so far as it denied the protection of last pay, is contrary to the terms and conditions of his absorption in service as a Peon made on 21st February, 1991. The said communication dated 21st July, 1999 is erroneous and illegal to that extent.

We are of the view that the State Government ought to have modified the order dated 25th July, 1991 of fixation of pay of the respondent as on the date of the absorption in service as a Peon giving him the

benefit of protection of last pay of Rs.1200 as determined by the order dated 20th July, 1995 (**Annexure-E** to the petition).

We are also of the opinion that as it was the request of the respondent to accommodate him at Ahmedabad or at Gandhinagar and as he offered to accept absorption on the post carrying lower pay-scale, the respondent cannot now be permitted to claim absorption in service on a post carrying higher pay-scale of Rs.1200-1800 or even of Rs.800-1150. The respondent, having accepted his absorption in service as Peon and having enjoyed posting at Ahmedabad, is not entitled to claim absorption on any other post. We are, therefore, of the view that the learned Single Judge has erred in directing the State Government to make order of placing the respondent in higher pay-scale from the date of his absorption. We are of the opinion that the grant of higher pay-scale on a subsequent date was a fortuitous circumstance that should not affect the factum that it was the respondent who wanted to remain at Gandhinagar or Ahmedabad and who willingly accepted the absorption

in service on the lower post of Peon.

In above view of the matter, we hold that the respondent is not entitled to absorption in service on a post carrying higher pay-scale or on any other post. His absorption in service as a Peon made on 21st February, 1991 and later on confirmed by order dated 19th September, 1997 had become final. The respondent, however, is entitled to pay protection assured under order dated 21st February, 1991 and pay fixation on the date of his absorption in service as a Peon on the basis of last pay drawn as on 26th July, 1990 (i.e. Rs.1200).

The Appeal is accordingly partly allowed. The impugned judgment and order of the learned Single Judge stands modified to the above extent. The State Government will now take up the exercise of pay fixation of the respondent as on 21st February, 1991 (the date of his absorption in service as Peon) in accordance with the aforesaid observations and directions. Such exercise shall be completed within ten weeks from today. Consequential benefit of such

pay fixation, if any, shall be paid to the respondent within three months from the date of the order of pay fixation. The parties shall bear their own cost. Civil Application stands disposed of.

(Ms. R.M.Doshit, J.) **(Harsha Devani, J.)**

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